DISCOVER BANK

January 30, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Regulation B Commentary – Docket No. R-1168
Regulation E Commentary – Docket No. R-1169
Regulation Z Commentary – Docket No. R-1167
Regulation DD Commentary – Docket No. R-1171

Dear Ms. Johnson:

Discover Bank is pleased to respond to the Federal Reserve Board's requests for comment dated November 26, 2003, regarding proposed revisions to the official staff commentaries to Regulations B, E, D, Z and DD. We appreciate the opportunity to comment.

Discover Bank is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and cardholders. The Board's proposed revisions to these official staff commentaries will have a significant impact on our operations.

1. The 12-Point Type Size Standard

In September 2000, the Board amended the official staff commentary to Regulation Z to provide that credit card application and solicitation disclosures that are in 12-point type "generally meet" the "clear and conspicuous" standard under Section 226.5a. While smaller type sizes do not "automatically" violate the standard, disclosures in type smaller than 8 point would likely be too small. Official Staff Commentary to Regulation Z, Section 226.5a. The clear implication is that disclosures in smaller than 12-point type will subject financial institutions to the expense and uncertainty of litigation. The Board now proposes to adopt the above font-size commentary with respect to all disclosures required to be "clear and conspicuous" under Regulations B, E, Z and DD.

We support the Board's efforts to provide consistency among Regulations. However, the Board should not treat all disclosures under the above Regulations as having equal significance to the consumer. In 2000, the Board correctly identified credit card applications and solicitations as being of particular importance to consumers given that credit card pricing had become increasingly complex:

> Over the years, the pricing of credit card programs has changed, and the cost disclosures accompanying card issuers' solicitations and applications have become more complex. Multiple APRs may apply to a single program. There may be a temporary introductory rate, a fixed or variable rate for all purchases after the introductory period expires, and one or more "penalty rates" that apply….

65 Fed. Reg. 58904 (2000). The Board cited this increased complexity, and the need for consumers to understand and compare "key costs and terms" for the purpose of "comparison-shopping." as key reasons for the change. *Id.* In short, the disclosures under Section 226.5a help lower the cost of credit to consumers by helping them compare sometimes complex pricing. While we in no way would minimize the importance of the other disclosure requirements of Regulation Z, or those of Regulations B, E, and DD, we believe they involve, in comparison, far less complexity and, in general, far less *direct financial benefit* to most consumers. Moreover, unlike the 2000 amendments, in these proceedings the Board has cited no particular change in the marketplace that would necessitate a change in its regulatory guidance.

While the changes in 2000 were for the express purpose of saving consumers money, the proposed changes would likely only achieve the opposite effect. Moving to a new *de facto* 12-point type standard would impose significant costs on financial institutions that would likely be borne by consumers themselves. We do not perceive there to be any significant consumer benefit that would justify these new costs. Moreover, we believe the increased size of the disclosures would largely offset any benefit from the larger type size, by making them appear more lengthy and intimidating. State laws have long recognized 8-point type as appropriate to ensure the legibility of important disclosures. *See, e.g.*, Cal. Admin. Code tit. 10, §§ 1404(b) et seq. (printed loan forms); N.Y. Pers. Prop. Law § 413 (retail installment credit agreements); N.Y. Gen. Bus. Law § 520-c(1) (disclosure of state banking department's phone number for comparative listing of rates, fees and grace periods); 69 Pa. Cons. Stat. Ann. § 1901 (application disclosures regarding finance charges and balance calculation method).

2. Disclosure Guidance Taken from Regulation P

The Board also proposes to adopt the guidance under Regulation P with respect to all disclosures required to be "clear and conspicuous" under Regulations B, E, Z and DD. Among other things, this guidance lists the following as examples of ways in which disclosures could meet the standard:

- Using "definite, concrete, everyday words" whenever possible;
- Avoiding "legal and highly technical business terminology" whenever possible;
- Avoiding explanations that are "imprecise and readily subject to different interpretations";
- Adding emphasis to "key words"; and

- Using “wide” margins and “ample” line spacing.

Again, we support the Board’s efforts to provide consistency among these Regulations. However, the above guidance is extremely subjective, imprecise, and even conflicting, and is therefore likely to lead to litigation over issues such as:

- What is a “key word”?
- Do key words need to be emphasized each time they appear?
- How wide are “wide” margins? What is “ample” line spacing?
- What are institutions to do when the use of “everyday words” instead of more accurate but technical terminology leads to less precision? Which is to be sacrificed – plain language or precision?

The proposed commentaries also suggest that even if a creditor uses all of the above techniques, the disclosures still may not be clear and conspicuous because of the presence of other information such as contract terms or disclosures required by state law. It is standard industry practice, and convenient for consumers, to use the same document to disclose contract terms and state law disclosures. Regulation E specifically permits combining disclosures, stating, “A financial institution may include additional information and may combine disclosures required by other laws…with the disclosures required by this part.” 12 CFR 205.4(b). The suggestion that the appearance of other information with required disclosures "may" result in a violation, without offering additional guidance, introduces an unacceptable level of uncertainty and litigation risk while offering no benefit to consumers.

Because there is no private right of action under Regulation P, institutions are not subjected to the risk of frivolous litigation if they fail to emphasize what a plaintiff alleges to be a particular “key word” or fail to use what a plaintiff considers “ample” line spacing or include important contract terms with their Regulation P disclosures in a way that allegedly makes the Regulation P disclosures inconspicuous. Under B, E, Z and DD, however, the risk of such litigation is very serious for institutions that must print millions of disclosure documents annually. For these reasons, we believe the Board should withdraw the portion of the Board’s proposal dealing with the use of guidance from Regulation P.

3. Request for Information Regarding Debt Cancellation and Suspension Products

The Board has requested information and comment regarding debt cancellation and debt suspension agreements (“DCAs” and “DSAs”, or collectively “DCSAs”) in its review and possible amendment to Regulation Z and the commentary. The Board has asked for comment about the similarities and differences between credit insurance and DCSAs. DCSAs are similar to credit insurance policies in that they either defer or cancel

some or all of a consumer's debt when certain events occur. However, there are two important differences. First, DCSAs are not insurance; there is no obligation taken on by a third party (insurance company) to repay the debt on behalf of the consumer. Second, there is no indemnity but rather an additional term of the loan that provides for the deferment or cancellation of the debt under certain circumstances.

The Board has also requested information regarding when DCSAs are offered to consumers. DCSAs can be offered to the consumer at any time during the loan relationship, as part of the application or thereafter. The DCSAs can take many formats. While often a comprehensive offer, consisting of a variety of benefits, is made to the consumer which includes the opportunity to defer or cancel payments under a number of circumstances, a consumer may instead be offered a DCSA with fewer benefit opportunities at a lower cost based on consumer preference and price considerations.

Finally, the Board has asked for comment on whether it should amend Regulation Z to address conversions from credit insurance to a DCSA. As the Board has noted, under the Truth in Lending Act ("TILA"), a credit card issuer must notify a consumer before changing the consumer's credit insurance provider. We believe that it would be helpful for the Board to address conversions from credit insurance to DCSAs and from a DCA to a DSA (or from a DSA to a DCA). It would also be useful if the Board provided guidance for conversions not only for credit card accounts but also for other types of loans where these types of programs are offered, such as closed-end loan programs. The content of the conversion disclosure should contain the following elements: (1) the type of change (for example, from credit insurance to a DCA); (2) the cost of the new product; (3) the material elements of the new product such as events covered, benefits provided and any limitations or exclusions; and (4) a statement that the product is optional and may be cancelled by the consumer. Notice of these changes would provide consumers with enough information to make an informed decision as to whether they want to retain the product. An affirmative election by the consumer, such as written acknowledgement from the consumer that they want the new product, should not be required since the consumer has already elected to enroll in this type of product prior to the conversion.

Again, we appreciate the opportunity to comment on these issues. We would be pleased to provide any further information you may need regarding these comments.

Respectfully submitted,

Discover Bank

K. M. Roberts
President